United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1049

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 75-1049

UNITED STATES OF AMERICA,

Appellee,

V.

ROBERT WAYNE GRANT,

Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLANT

Charles N. Sturtevant
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Hartford, Connecticut

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CASES CITED

OTHER AUTHORITY

STATEMENT OF THE CASE

This is an appeal from rulings denying two Motions to Dismiss that claimed the Government failed to re-try the defendant within "90 days after the finality of such order (by the appellate court)" in violation of Rule 6, District of Connecticut Plan for Achieving Prompt Disposition of Criminal Cases. The first Motion to Dismiss was filed on September 24, 1974 (App. 10-11) and was denied that same day by the Honorable Thomas F. Murphy, (See docket sheet, App. 5), sitting by special designation in Waterbury. The second Motion to Dismiss was filed on October 22, 1974 (App. 12-13) and denied by the Honorable M. Joseph Blumenfeld in a written decision of November 15, 1974 (App. 14-19).

The appellant has filed this appeal after entering a plea of guilty to a substituted Information (App. 20) and reserving his rights to appeal the rulings that denied a dismissal pursuant to the 90-day requirement of Rule 6. Judge Blumenfeld suspended imposition of sentence and placed the appellant on five years probation.

A timely Notice of Appeal was filed. (App. 9)

STATUTES INVOLVED

Plan For Achieving Prompt Disposition of Criminal Cases, United States District Court of Connecticut

6. Retrials.

Where a new trial has been ordered by the district court or a trial or new trial has been ordered by an appellate court, it shall commence at the earliest practicable time, but in any event not later than 90 days after the finality of such order unless extended for good cause.

Federal Rules of Appellate Procedure

Rule 41 - Issuance of Mandate; Stay of Mandate

(a) Date of Issuance. The mandate of the court shall issue 21 days after the entry of judgment unless the time is shortened or enlarged by order. A certified copy of the judgment and a copy of the opinion of the court, if any, and any direction as to costs shall constitute the mandate, unless the court directs that a formal mandate issue. The timely filing of a petition for rehearing will stay the mandate until disposition of the petition unless otherwise ordered by the court. If the petition is denied, the mandate shall issue 7 days after entry of the order denying the petition unless the time is shortened or enlarged by order.

QUESTION PRESENTED

1. Whether the 90-day period set out in Rule 6 of the Plan for Achieving Prompt Disposition of Criminal Cases commenced on July 1, 1974 (when the mandate should have issued in the absence of a petition for a stay) or on July 19, 1974 (when the mandate did tardily issue).

STATEMENT OF FACTS

On October 15, 1971 the appellant was convicted by a jury of a bank robbery in Criminal No. H-35, United States v. Robert Wayne Grant, and sentenced on December 6, 1971 by the Honorable T. Emmet Clarie to 15 years imprisonment. The judgment of conviction was affirmed by a panel of this Court on May 19, 1972 (Docket No. 72-1042).

On June 6, 1972 the appellant filed a Motion to Vacate Judgment and an application to proceed in forma pauperis. The Court, Clarie, J., granted the forma pauperis motion and appointed the Federal Public Defender's Office to represent Grant. On October 2, 1973 Judge Clarie denied in full Grant's motion in a written Memorandum of Decision.

An appeal of Judge Clarie's decision was duly taken and on June 10, 1974 a panel of this Court vacated the judgment of conviction and ordered a new trial, Grant v. Alldredge, 498 F.2d 326 (2d Cir. 1974). Although the Second Circuit's mandate in the above case was dated June 10, 1974, the date the decision was rendered, it was not issued or mailed until July 19, 1974, and it was not received by the Clerk of the United States District Court in Hartford until July 24, 1974. (App. 21) The appellant was released on bond when a $5,000.00 surety bond was posted on July 3, 1974.

On August 28, 1974 a formal Notice of Readiness was filed by the United States Government. On September 24, 1974 the appellant filed a Motion to Dismiss based on Rule 6 of the Plan for Achieving Prompt Disposition of Criminal Cases. (App. 10-11) The appellant's argument in support of this motion was basically that the words "90 days after finality of such order" meant 90 days from the day the judgment was rendered by the appellate court, and that the government could not realistically argue that the 90-day period commenced on the day the mandate was issued as the mandate in this case had not been issued until July 19, 1974, 19 days after it should have been issued as required by Rule 41 of the Federal Rules of Appellate Procedure. (See Brief in Support of Motion to Dismiss, App. 11a-11d) Judge Murphy denied this motion from the bench on the same day it was filed.

On October 22, 1974 the appellant filed another Motion to Dismiss arguing that the government had violated Rule 6 by failing to bring the appellant to trial within the 90 days of the Mandate entered by the Second Circuit Court of Appeals. (App. 12-13) Judge Blumenfeld denied this motion on November 15, 1974 as he found that delays caused by the filing of pre-trial motions by Grant on October 3, 1974 and October 4, 1974 created excluded periods (seven days in total) and, therefore, the 90 days had not lapsed since July 19, 1974.

(App. 14-19) In his decision Judge Blumenfeld noted that "it is apparent that [Judge Murphy] considered July 19, 1974 to be the date from which the 90-day period was to run. (App. 15) Neither the government or the appellant, pursuant to Rule 41 of the Federal Rules of Appellate Procedure, had moved for an order to enlarge the time within which the mandate issue.

On November 16, 1974 Grant waived indictment and entered a plea of guilty to a One Count Substituted Information charging him with a violation of 18 U.S.C. §2113(c), receiving and possessing moneys stolen from a bank, the deposits of which were insured by the F.D.I.C. (App. 20) Upon entering this plea of guilty before Judge Blumenfeld the defendant reserved his right to appeal the rulings denying the two Motions to Dismiss that were based on Rule 6 of the Plan.

On January 6, 1975 the appellant was sentenced by Judge Blumenfeld to an imposition of sentence suspended, and probation of five years with a condition that the defendant make a good effort to make restitution out of his own earnings.

ARGUMENT

I. THE GOVERNMENT'S FAILURE TO RE-TRY THE APPELLANT WITHIN 90 DAYS OF THE DAY OF THE MANDATE SHOULD HAVE ISSUED VIOLATED RULE 6 OF THE DISTRICT OF CONNECTICUT PLAN FOR PROMPT DISPOSITION OF CRIMINAL CASES AND REVERSAL OF THE CONVICTION AND DISMISSAL OF THE INDICTMENT ARE REQUIRED

The appellant's claim is quite precise. On June 10, 1974 the appellant's conviction was reversed and a new trial was ordered. Rule 41(a) of the Federal Rules of Appellate Procedure requires that "the mandate of the Court shall issue 21 days after the entry of judgment unless the time was shortened or enlarged by order." The mandate in this case was not issued until July 19, 1974 and neither the government nor the defendant made any request to enlarge the time.

The appellant no longer contends that the 90-day period commenced on the day the decision and judgment was rendered. Recently in United States v. Drummond, Docket No. 74-2264 (February 11, 1975), the Court (The Honorable Irving R. Kaufman, Chief Judge, The Honorable Wilfred Feinberg, The Honorable Walter R. Mansfield) in dictum in footnote 4 stated that the 90-day period in that case did not begin to run on the date of the Court's decision. The rule in question in that case was Rule 6 of the Eastern District's Plan for Achieving Prompt Disposition of Criminal Cases, a rule which is identical to

Connecticut's Rule 6 except that it uses the term "extended for good cause" instead of "excluded for good cause". Unfortunately, the Court in Drummond specifically did not decide whether the 90-day period commenced on the day when the mandate should have issued or on the date the mandate did tardily issue. Id. 1784, n.4

Also, the appellant no longer contends that the Government failed to re-try the appellant within 90 days of July 19, 1974 as Judge Blumenfeld's reasoning on that issue in the Memorandum of Decision on the Motion to Dismiss (App. 14-19) is substantially supported by the ruling in Drummond.

The appellant does claim, however, that the 90-day period commences on the day the mandate should have been issued. In this case the mandate should have been issued on July 1, 1974 pursuant to Rule 41 of Federal Rules of Appellate Procedure, or 21 days after the June 10th judgment. Accepting Judge Blumenfeld's finding that a delay of seven days was caused by the appellant's motions, the 90 days had still lapsed by October 23, 1974. The period from October 23, 1974 to November 15, 1974 is an excluded period because the appellant and government were waiting for the Court's decision and because the appellate had agreed in a stipulation to toll any periods of time from October 23, 1974 to the date set for trial on November 19, 1974 (See footnote 1 of Judge Blumenfeld's

Memorandum of Decision on the October 22, 1974 Motion to Dismiss, App. 15)[1/]

No justification has been offered for either the delay in issuing the mandate or for the government's failure to try the appellant earlier.[2/] Certainly if a delay resulting from court congestion is not an acceptable justification for a delay under Rule 6 (Memorandum of Decision, App. 19), the government should not be allowed to avoid dismissal and accountability because of a clerical error by the Court of Appeals. The government obviously does not claim that it was unaware of the decision rendered on June 10, 1974.

6. Retrials.

> Where a new trial has been ordered by the district court or a trial or new trial has been ordered by an appellate court, it shall commence at the earliest practicable time, but in any event not later than 90 days after the finality of such order unless extended for good cause.

The language of Rule 6 of the Plan is quite plain (See United States v. Drummond, supra at 1785). Likewise, Rule 41(a) of the F.R.A.P. plainly states that "the mandate of the Court

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1/ As noted in the Statement of Facts the Appellant entered a plea of guilty to a Substituted Information on November 16, 1974.

2/ Even though the government filed a Notice of Readiness, Rule 6 requires that the trial commence within 90 days, not that the government merely be ready. United States v. Drummond, supra at 1785.

shall issue." This precise language does not lend itself to exceptions, especially unclaimed and/or unsubstantiated exceptions.

The Courts have clearly stated that "the philosophy underlying these Rules seeks to vindicate the public's interest in the swift and just administration of criminal justice". (Memorandum of Decision of Defendant's Motion to Dismiss, App. at 17-18) citing United States v. Bosques, 364 F. Supp 131, 134 (D. Conn. 1973) (emphasis in original) and United States v. Lasker, 481 F.2d 229, 233, (2d Cir. 1973), cert. denied 419 U.S. 975 (1974). Nevertheless, the substantial rights of the appellant and public policy should not be affected by a clerical error and the Court's failure to comply with the Federal Rules of Appellate Procedure. More importantly, the government has never advanced a reason as to why the appellant's trial could not have commenced within 90 days of July 1, 1974. Although the delay in this case is less than that found in Drummond (more than nine months), the Court's admonishment in that case that "[b]oth the United States Attorney and the Judge to whom a retrial is assigned should closely monitor its progress," Id. at 1789, should apply in this case.

The fact of the matter is that these Rules exist and their

requirements were not met. If the 90-day period was impracticable in this case the government should have moved to enlarge the period. Because such a motion was not made, Rule 6 should not be diluted and interpreted to mean that the 90-day period begins when the individual responsible for issuing the mandates "get's around to it". The 21 day restriction is not stated as being a general guideline but as a definite outside limit as to when the mandate shall issue.

CONCLUSION

For the above-stated reasons, the judgment of the District Court should be reversed, and the case remanded with a direction that the indictment be dismissed.

Respectfully submitted,

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CERTIFICATION

This is to certify that a copy of the above was delivered to the Office of the United States Attorney, 450 Main Street, Hartford, Connecticut.

Charles N. Sturtevant

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